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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-303

THOMAS J. PALMER, INC., LAKE CONSTRUCTION CO., INC.,  
KENNETH G. WALKER and THOMAS J. PALMER,  
*Petitioners,*

v.

CROCKER NATIONAL BANK and SUPERIOR COURT OF THE  
STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT

## Brief for Respondent Crocker National Bank in Opposition

MORRISON & FOERSTER  
ROBERT D. RAVEN  
RONALD F. BROTH  
RONALD G. CARR  
523 West Sixth Street  
Los Angeles, California 90014  
Telephone: (213) 626-3800  
*Counsel for Respondent  
Crocker National Bank*

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**Brief for Respondent Crocker National Bank  
in Opposition**

Petitioners have prayed that a writ of certiorari issue to review the order of the Supreme Court of the State of California, entered on May 26, 1977, denying petitioners' "Petition for Hearing on Peremptory Writ of Prohibition Issued by the Court of Appeal of the State of California, Second Appellate District." The judgment of the California Court of Appeal granting the writ of prohibition, rather than the California Supreme Court's order denying hearing, is the judgment of "the highest court of a State in which decision could be had", 28 U.S.C. § 1257, and therefore the

judgment subject to review by this Court on petition for writ of certiorari.\*

In any event, however, the issues presented in the petition to this Court have become moot. As we explain fully below, the writ of prohibition granted by the Court of Appeal directed the California Superior Court for the County of Los Angeles to vacate a preliminary injunction it had entered against respondent Crocker National Bank (hereinafter "Crocker"), restraining Crocker from honoring any demand for payment, under a letter of credit, made by the letter of credit beneficiary—Turkiye Is Bankasi AS (hereinafter "Turkish Bank"). Petitioners here, plaintiffs in the underlying Superior Court action and participants as real parties in interest in the writ of prohibition proceeding, filed a petition for hearing in the California Supreme Court, which was denied. They then filed this petition. They failed, however, to seek from the Court of Appeal a stay of its writ pending decision on their petition to this Court. Accordingly, the writ of prohibition issued on September 22, 1977. In compliance with the writ, the Superior Court dissolved its preliminary injunction against Crocker on September 29, 1977.

Thereafter, Crocker repeatedly requested that petitioners supply it with information sufficient, under California law, to allow it to refuse to meet its otherwise clear legal obligation immediately to honor the demand for payment that Turkish Bank had made. Petitioners failed to do so.

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\*In denying petitioners' Petition for Hearing, the California Supreme Court declined to exercise the discretionary review authority granted it by Art. 6, § 12 of the California Constitution. In these circumstances, this Court repeatedly has recognized that, under § 1257, the writ of certiorari properly is directed to the highest state court that entered judgment on the merits—here, the California Court of Appeal. *E.g., Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951). R. Stern & E. Gressman, *Supreme Court Practice* § 6.31, at 290 (4th ed. 1969).

On October 17, 1977, Turkish Bank reiterated its demand, insisting upon payment at once. On October 21, Turkish Bank again notified Crocker that it expected immediate payment, and indicated that unless Crocker honored the demand for payment at once, Turkish Bank would protect its interest by exercising an offset against Crocker assets held by it in deposit. For this reason, and because of the lack, by that time, of any basis under California law for refusing to honor the obligation, Crocker was compelled to make payment under the letter of credit at the earliest opportunity. After having notified petitioners of all of these circumstances, Crocker paid Turkish Bank the principal due under the letter of credit on the morning of October 24, the next business day following receipt of the Turkish Bank's October 21 notice and, of course, prior to the issuance of a stay by this Court.

Because Crocker has now made payment under the letter of credit, any decision by this Court on the issues presented in the petition no longer could affect the substantive rights of any party. In brief, the act that petitioners have sought to enjoin has irretrievably occurred. *E.g., Brownlow v. Schwartz*, 261 U.S. 216 (1923). Accordingly, Crocker respectfully suggests that, as to the issues presented, there is absent a live case or controversy between the parties.

#### **OPINION BELOW**

The opinion of the California Court of Appeal, Second Appellate District (Exhibit A in Petition Appendix) is reported at 68 Cal. App. 3d 863 (1977).

#### **JURISDICTION**

The petition, if treated as a petition for a writ of certiorari to the Court of Appeal of the State of California,

Second Appellate District, satisfies the jurisdictional requisites of 28 U.S.C. § 1257(3). The issues presented in the petition are, however, moot.

#### **QUESTION PRESENTED**

Whether the California Court of Appeal properly construed 12 U.S.C. § 91 as prohibiting a state court from preliminarily enjoining a national bank from meeting its legal obligation to make payment on proper demand under a letter of credit, where any payment would be made from the bank's own assets and where failure to make payment could result in loss to the national bank of its assets held by the letter of credit beneficiary.\*

#### **STATUTORY PROVISION INVOLVED**

The pertinent provision of section 91 of the National Banking Act (12 U.S.C. § 91) is set forth in the Petition at page 2.

#### **STATEMENT**

The petition now before the Court is the most recent move in a complex set of litigative maneuvers by which petitioners have attempted to shift to respondent Crocker the primary risk of loss in a contract dispute between petitioners and others, a dispute in which Crocker had no part whatsoever. Although the issues presented in the petition are now moot, Crocker believes that the Court should have a full account of the commercial relationships that the peti-

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\*The petition purports to present a second question—whether 12 U.S.C. § 91 immunizes a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment. This question was neither presented to nor decided by the California Court of Appeal, and therefore is not properly before this Court. *E.g., California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

tion concerns and the history of the litigation that they have engendered, in order to understand why mootness has resulted and why, in any event, the issues presented in the petition were not deserving of this Court's review.\*

The commercial transactions on which this litigation is based are detailed in the Court of Appeal's opinion, which in turn relied on pleadings filed in the underlying Superior Court action. Briefly, the pleadings reveal the following facts:

Two Alabama corporations formed a joint venture—NATISCO—which entered into a contract to sell coal to Turkiye Demir Ve Celik Isletmeleri Genel Mudurlugu (hereinafter "Turkish Steel"). The coal sales contract required that NATISCO provide a guaranty of its performance. NATISCO then entered into a contract with petitioners by which, in exchange for the financing which NATISCO required to secure the necessary performance guaranty, petitioners received, *inter alia*, pledges of stock in NATISCO's two constituent corporations. Petitioners thereupon arranged to provide the performance guaranty required by the NATISCO-Turkish Steel contract. Pursuant to a letter of credit application submitted by certain of the petitioners, Crocker issued an irrevocable letter of credit, in the sum of \$522,000, in favor of Turkish Bank. Based on this irrevocable letter of credit naming it as beneficiary, Turkish Bank agreed to issue to Turkish Steel a letter of guaranty assuring NATISCO's performance. By the terms of the letter of credit agreement between Crocker and Turkish Bank, Crocker was to pay to Turkish Bank up to \$522,000 upon Turkish Bank's presentation of a document

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\*We submit the facts that support mootness in the form of a brief, rather than by affidavit, in accordance with what we understand to be the Court's usual practice. R. Stern & E. Gressman, *Supreme Court Practice* § 18.2, at 592 (4th ed. 1969).

stating that the amount of its letter of credit demand represented the amount Turkish Bank had been obliged to pay to Turkish Steel pursuant to the letter of guaranty. Under the terms of petitioners' letter of credit application, if Turkish Bank so drew upon the letter of credit, petitioners would reimburse Crocker for the amount Crocker had paid.

In April, 1976, because of asserted breaches of the contract in which petitioners had agreed to finance NATISCO, petitioners foreclosed upon the pledge of stock, acquiring all of the stock in one of NATISCO's two constituent corporations and ninety-eight percent of the stock in the other. Petitioners also obtained an injunction from the Circuit Court of the State of Alabama restraining certain persons or entities who were parties to or connected with the NATISCO venture and the financing agreement from, *inter alia*, making shipments of coal to Turkey under the NATISCO-Turkish Steel sales contract.\*

On October 29, 1976, petitioners instituted the action in California Superior Court from which this petition has resulted. The complaint named as defendants the defendants in the Alabama state court action and, among others, Turkish Steel, Turkish Bank, and Crocker. The complaint alleged that all of the defendants, with the specific exception of Crocker, had conspired to usurp the benefits of the NATISCO-Turkish Steel sales contract and, in particular, had conspired to cause petitioners irreparable injury by taking advantage of the irrevocable letter of credit from Crocker that petitioners had secured. The complaint did not claim that Crocker in any way had violated or was about to violate any obligation to petitioners. To the contrary, the only allegation as to Crocker was that, if Crocker honored

a demand by Turkish Bank on the letter of credit, petitioners would suffer a loss of any amount so paid. As to all defendants except Crocker, the complaint sought damages. In addition, the complaint sought temporary and permanent injunctive relief. On November 15, the Superior Court granted the preliminary injunctive relief that petitioners had requested. It enjoined all defendants--including Turkish Steel and Turkish Bank, neither of which had appeared in the action—from taking any act that might cause the letter of credit to be honored. In addition, it enjoined Crocker from honoring any demand for payment under the letter of credit if any such demand was made.

Crocker immediately filed a petition to the California Court of Appeal for a writ of prohibition directing the Superior Court to vacate the preliminary injunction insofar as it restrained Crocker from honoring a proper demand on the letter of credit. Crocker sought this extraordinary relief on three separate grounds:

1. Petitioners had failed to demonstrate that, absent the injunction, they would suffer the irreparable injury requisite to such relief under California law; to the contrary, petitioners had clear legal remedies available—in defense against any reimbursement action by Crocker if Crocker paid wrongfully, as well as in damages against the remaining defendants.

2. Under California Commercial Code § 5114 the issuer of a letter of credit *must* honor a demand for payment that, on its face, complies with the letter of credit terms; in enacting section 5114, the California legislature specifically rejected the Uniform Commercial Code provision that would have allowed a court of equity to enjoin the issuer, in such circumstances, from honoring the demand.

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\*Neither Crocker, Turkish Steel, nor Turkish Bank was a party to the Alabama action.

3. 12 U.S.C. § 91 precludes a state court preliminary injunction restraining a national bank from honoring a letter of credit demand in the situation presented here.

The Court of Appeal found it necessary to address only the last of these grounds. The Court identified two primary, critical aspects to Crocker's obligations under the letter of credit. First, Crocker's obligation to pay upon proper demand was entirely independent of any performance or failure of performance under the Turkish Steel-NATISCO contract or the financing agreement that petitioners had entered. Second, upon proper demand, Crocker was obligated to pay under the letter of credit out of its own assets, regardless of whether it expected to receive reimbursement from petitioners. The Court described the nature of Crocker's obligation in the following terms:

In short, apparently what is present in the instant case is a letter of credit of guarantee for a "guarantee validity" by the Turkish Bank of a third party seller's performance under a contract. . . . Upon presentation of the documentary requirement (the signed statement by the Turkish Bank in accordance with the provisions of the letter of credit), Crocker is to honor drafts from its own funds. (Pet. App. at 9-10)

The Court concluded that, in these circumstances, 12 U.S.C. § 91 precluded a state court preliminary injunction preventing Crocker from honoring its obligation if proper demand was made. The Court found it clear that, because Crocker was obliged to honor proper demand regardless of whether or not it could expect reimbursement, the injunction necessarily affected the national bank's capacity to protect and dispose of its own assets. On that ground, the Court distinguished *Drewes & Co. v. Ham & Seymour*, 157 La. 861, 103 So. 241 (1925), in which the court had held a preliminary injunction proper, under the statutory pred-

ecessor to section 91, where any payment under the letter of credit was to be drawn from a special deposit made for that purpose and not part of the national bank's own assets. The Court of Appeal's decision rested, however, not only on the fact that the preliminary injunction affected Crocker's own assets, but also on the conflict between the injunction and the interests that section 91 was intended to protect. The Court observed, in particular, that if Crocker failed to honor a proper demand, Turkish Bank could exercise an offset against Crocker funds held by it in deposit:

Since Crocker's contractual obligations under its letter of credit require that it engage its own credit for the honor of the letter of credit and as Crocker may face loss of its assets in a foreign bank, the issuance of a preliminary injunction could impair the efficiency of a national banking association. (Pet. App. at 11-12)

Accordingly, the Court determined that a writ of prohibition should issue directing the Superior Court to vacate its preliminary injunction insofar as it applied to Crocker. The Court of Appeal entered its judgment on April 1, 1977. Petitioners thereupon filed a petition for hearing in the California Supreme Court. On May 26, the petition was denied.

While their petition for hearing to the California Supreme Court was pending, petitioners turned their efforts to the federal district courts. Petitioners first filed a complaint in the District Court for the Central District of California (No. CV 77-1624), repeating the substantive allegations of their Superior Court complaint and seeking preliminary and permanent injunctive relief against Crocker. The action was dismissed by judgment entered on May 10, 1977, for want of proper venue under 12 U.S.C. § 94. On May 11,

petitioners filed a complaint in the District Court for the Northern District of California (No. C 77-0971) again seeking injunctive relief against Crocker and observing that 12 U.S.C. § 91—the basis of the California Court of Appeal decision—has no application to federal courts.

Since section 91 was inapplicable, Crocker opposed petitioners' requests for a temporary restraining order and preliminary injunctive relief in the Northern District action on the alternative grounds that it had urged to the Court of Appeal. In brief, Crocker first pointed out that sections 5109 and 5114 of the California Commercial Code require that the issuer honor a demand for payment under a letter of credit if the demand is proper on its face (section 5114(1)) or, even though there is fraud in the underlying transaction, if the documents are proper and the demand is made by a holder in due course (section 5114(2)(a)). Since the demand that, by this time, Turkish Bank had made was proper on its face and petitioners had made no showing that Turkish Bank was not a holder in due course, Crocker was legally obliged to honor the demand. In any event, California Commercial Code § 5114(2)(b) provides that, even if the issuer is not compelled to honor by § 5114(1) or § 5114(2)(a), it has, in all cases, the privilege of honoring so long as it does so in good faith.\* Moreover, in enacting these sections, the California legislature specifically rejected the Uniform Commercial Code provision that would have allowed courts to enjoin honoring of a demand by a beneficiary, and thus clearly demonstrated its view that such an injunction is inappropriate.

Crocker also opposed petitioners' request to the district court on the ground that they had failed to demonstrate

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\*These California Commercial Code provisions are reprinted in the Appendix to this brief.

the requisite bases for preliminary equitable relief. On the one side, petitioners had failed to show that they would suffer irreparable injury if Crocker honored Turkish Bank's demand, since they clearly have an adequate remedy at law if either the demand itself or Crocker's action in honoring it breached any legal obligation to them. On the other side, Crocker had clearly shown that, were it restrained from making payment, it would suffer irreparable injury, since Turkish Bank was not within the court's jurisdiction, and Crocker's failure to honor its demand would cause Turkish Bank to seize, by way of set off, the Crocker funds which it held.

On May 11, 1977, primarily because of the California Commercial Code provisions discussed above and grave doubt as to whether the court had, or could have, jurisdiction over Turkish Bank, District Judge Renfrew denied petitioners' application for a temporary restraining order. On May 23, 1977—the same day on which Crocker filed its opposition—petitioners withdrew their application to the district court for a preliminary injunction.\*

As indicated above, Crocker had by this time received demand for payment from Turkish Bank that complied in all respects with the letter of credit terms.\*\* In response to

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\*Crocker filed a motion to dismiss the Northern District action on October 19, 1977, on the grounds that the complaint failed to state a claim against Crocker and that the court lacks jurisdiction over indispensable parties—in particular, Turkish Bank. By stipulation between Crocker and petitioners, Crocker has agreed to withdraw the motion without prejudice, to give petitioners an opportunity to file an amended complaint.

\*\*Turkish Bank initially made demand in late January, 1977. Crocker informed Turkish Bank that the documentation provided did not, in certain technical respects not here relevant, comply with the letter of credit requirements. In late February, Turkish Bank provided a new demand and documentation to cure the original deficiencies. Crocker again noted a technical deficiency. Finally, on March 13, 1977, Crocker received from Turkish Bank a demand and documentation that fully conformed to the letter of credit terms.

this demand, and to repeated cables from Turkish Bank in March and April, 1977, insisting that it be honored, Crocker informed Turkish Bank that both apparently remained subject to the Superior Court injunction and that Crocker was making every legal effort to have the injunction, as to Crocker, removed. On June 14, 1977, officers of Crocker met with representatives of Turkish Bank and informed them that, although the Court of Appeal had decided in Crocker's favor and although the California Supreme Court had denied hearing, the writ of prohibition had not issued and the preliminary injunction as to Crocker remained in effect. Moreover, the writ would have no effect on the injunction as to Turkish Bank—an injunction concerning which Crocker plainly had notice.

On August 23, 1977, petitioners filed the present petition to this Court. In Crocker's view, the reasons presented in the petition as justifying this Court's review were, on the face of the petition itself, plainly devoid of merit and were entirely refuted in the Court of Appeal opinion. Indeed, Crocker believed that the only possible basis for any favorable action on the petition was this Court's own intervening decision in *Third National Bank in Nashville v. Impac Limited, Inc.*, 45 U.S.L.W. 4738, decided June 17, 1977—a decision that petitioners apparently regarded as irrelevant to this case, since they nowhere relied upon or even cited it in their petition. Moreover, it appeared that if *Impac* was relevant at all, it would at most justify a remand for reconsideration by the California Court of Appeal, and, of course, Crocker knew that this Court was fully aware of its own decision and would be able to identify from the Court of Appeal's opinion whether, under *Impac*, a remand was appropriate. In these circumstances, Crocker, on advice of counsel, decided that the expense required to file an opposi-

tion—an expense that would only add to the enormous cost it had already incurred in attempting to meet its letter of credit obligation—was unjustified unless a response was requested by the Court.

In filing the petition to this Court, petitioners inexplicably failed to seek or obtain from any California court a stay of the Court of Appeal's writ, despite the clear availability of such relief under 28 U.S.C. § 2101(f).<sup>\*</sup> Because of petitioners' failure, the writ issued on September 22, 1977. On September 29, in compliance with the writ, the Superior Court vacated its preliminary injunction insofar as it directed Crocker not to honor Turkish Bank's demand.

Once the Superior Court vacated the preliminary injunction it had entered as to Crocker, no order of any court

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\*In their application to Mr. Justice Rehnquist for an order directing Crocker to maintain the *status quo* pending action by this Court—an application that was not filed until October 24, 1977—petitioners attempted to explain this failure by stating that "there is considerable uncertainty whether any of the three [California] courts involved or any judge of those courts has jurisdiction to grant the requested relief . . ." In fact, however, 28 U.S.C. § 2101(f) provides, in pertinent part, that:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution or enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court. . . . (Emphasis added.)

There can thus be no doubt that, as a matter of federal law, the California Court of Appeal had power to stay its mandate on proper application. *In re Chessman*, 43 C.2d 408, 413, 274 P.2d 645 (1954) (Carter, J.). Presumably, therefore, the uncertainty that petitioners expressed in their October 24 application must attach, not to the California courts' power to entertain a stay application, but to their power, once the original injunction had been vacated, to renew the injunction pending this Court's decision. But petitioners' uncertainty cannot excuse their inexplicable failure to seek any relief at any time from any California court—a failure that, under this Court's Rule 27, normally would preclude favorable action on their application to a Justice of this Court.

restrained Crocker from honoring a demand under the letter of credit. Moreover, there was no indication from petitioners that they were taking, or planned to take, any action to seek interim relief, even though they were aware that, in March, Crocker had received from Turkish Bank a demand for payment under the letter of credit that complied in all respects with the letter of credit requirements.

Crocker nonetheless refrained from honoring Turkish Bank's demand because Turkish Bank apparently remained subject to those aspects of the Superior Court's preliminary injunction that had not been vacated. In so acting, Crocker exposed itself to considerable danger. Failure to honor could result in Turkish Bank's seizing Crocker's assets. If that occurred, Crocker would be faced with a Hobson's choice. On the one side, it could attempt to litigate—in Turkey—the legality of the set off. This alternative would cause enormous legal expense. In addition, its success would be at best unlikely, given the clear California Code provisions requiring issuers to honor proper demands and the probability that, as to Turkish Bank, the California Superior Court lacked jurisdiction to enter any injunction at all. On the other side, Crocker could treat the seizure of its funds as the equivalent of payment under the letter of credit and then seek reimbursement from petitioners—an alternative that, to all appearances, would also generate expensive and protracted litigation and the success of which would be equally uncertain.

Recognizing the difficulty of Crocker's position, Turkish Bank, despite Crocker's failure to pay, did not immediately attempt to seize Crocker's funds. Instead, on September 22, 1977, it filed in the Superior Court motions to quash service of process and to dismiss for want of jurisdiction. On October 12, 1977, the Superior Court granted the motion to quash on the ground that petitioners had failed to comply

with requirements both of California law and of a treaty to which Turkey and the United States are parties. Since a preliminary injunction is an *in personam* decree, e.g., *Berger v. Superior Court*, 175 C. 719, 721, 167 P. 143 (1917), and since a court may not issue a judgment *in personam* without having acquired jurisdiction over the party to whom the judgment applies, e.g., California Code of Civil Procedure § 1917, it appeared that the preliminary injunction previously entered by the Superior Court was, as to Turkish Bank, no longer effective. Accordingly, as of October 12, there no longer appeared to be any legal basis whatsoever for Crocker to avoid honoring Turkish Bank's demand.

Faced with this situation, Crocker, by letter from its counsel dated September 30, 1977, requested petitioners to supply information sufficient, under California law, to warrant Crocker's continued refusal to honor the demand. In particular, Crocker asked petitioners what facts supported the conclusory allegations, contained in their various complaints, that Turkish Bank had engaged in fraudulent conduct and so was not a holder in due course. On October 10, 1977, confirming telephone conversations in the intervening period, petitioners' counsel responded that it was a "physical impossibility for [him] to comply with the request." On October 12, petitioners and their counsel met with the Chairman of Crocker's Board of Directors, Mr. Thomas Wilcox, and with Crocker's counsel and other officers. Again petitioners could offer no information to substantiate their allegations as to Turkish Bank. Mr. Wilcox agreed, however, to ask the Turkish Bank's assistance in arranging a meeting among the parties to the underlying contract dispute. He did so by cable of October 13, 1977, asking, in addition, for Turkish Bank's patience in receiving payment on its demand.

By October 12, when the service of process on Turkish Bank was quashed, the situation had become, from Crocker's standpoint, critical. On October 14, Crocker's counsel reiterated the request for substantiating information and, in particular, asked whether petitioners claimed that Turkish Bank was not a holder in due course. Petitioners' counsel again responded that they were unable to supply the information at that time. On the same day, Crocker was asked by this Court to submit a response to the petition for certiorari no later than November 11.

On October 17, Crocker received from Turkish Bank a cable observing that service upon it had been quashed and demanding that Crocker effect payment at once. Crocker immediately notified Turkish Bank of this Court's request for a response. On Friday, October 21, Crocker received a second cable from Turkish Bank, stating that, while it was willing to help arrange a meeting among the parties to the contract dispute, it could not delay its insistence on payment. The cable further indicated that, unless Crocker made payment at once, Turkish Bank would take appropriate action with respect to the Crocker deposits that it held. Because of this and because Crocker could perceive no legal basis whatsoever for postponing payment any longer, on Friday, October 21, Mr. Wilcox notified petitioners that Crocker intended to make payment at the opening of business on the next business day—Monday, October 24.

On that morning, petitioners' counsel notified Crocker that they contemplated an application to this Court for a stay of the Court of Appeal's judgment. Since that judgment had issued and the preliminary injunction had been vacated nearly one month before, and since, despite the general requirement of this Court's Rule 27, no such relief had been sought from any California court at any time in the six months since the Court of Appeal judgment had

been entered, Crocker believed that it was, at best, highly doubtful that any such stay would issue or, if it did, that the injunction against Crocker would be brought back to life. In any event, Crocker believed that such an eleventh hour application, in uncertain form and with such highly uncertain effect, could not justify any delay in payment, given its otherwise clear legal obligation and the equally clear threat to its assets contained in the most recent Turkish Bank communications. Accordingly, at approximately 10 A.M.\* Crocker's counsel notified petitioners' Washington counsel that Crocker would make payment immediately. At 11:57 A.M., Crocker honored Turkish Bank's demand. At approximately 2:00 P.M., Crocker's counsel received notice that, at approximately 1:30 P.M., a stay had issued and would remain in effect pending Crocker's response to the application.

#### **ARGUMENT**

Crocker has presented this detailed account of the circumstances underlying this petition in order to clarify as much as possible the situation which led to its payment of Turkish Bank's demand. As a result of petitioners' litigative maneuvers, Crocker was placed in an impossible position. If it failed to pay Turkish Bank once proper demand had been received, it violated the clear requirements of the California Commercial Code and, moreover, risked loss of its assets held in deposit by Turkish Bank. If it paid Turkish Bank while a preliminary injunction against either Crocker or Turkish Bank remained outstanding, it was open to charges that it had itself violated an injunction, or had aided and abetted others in doing so, and in all events faced the prospect of long and expensive litigation in an effort to

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\*All times referred to are Pacific Daylight Time.

secure reimbursement. The purpose of petitioners' efforts is evident. If Crocker could be delayed from paying until Turkish Bank, in exasperation, seized Crocker's assets, Crocker would have the burden of litigating to recover the loss, whether from petitioners or from Turkish Bank, and the result would be uncertain and long in coming. In short, Crocker would bear the primary risk of loss in the underlying contract dispute—a dispute in which, as petitioners' own complaint specifically acknowledges, Crocker played no part and committed no wrong.\*

#### **I. The Issues Presented in the Petition Are Moot.**

The petition seeks to have this Court decide whether the Court of Appeal properly ordered that the preliminary injunction against Crocker be vacated. Since Crocker has made the payment that petitioners sought to prevent, the issue between the parties is no longer whether such payment properly is subject to a preliminary injunction in the state court. It is, instead, whether Crocker can secure reimbursement. Any eventual resolution of this issue will in no way depend on whether the Court of Appeal's decision was correct,\*\* and there is, moreover, no reason to suppose that

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\*Petitioners' failure to seek a stay from the Court of Appeal was consistent with this overall effort. Had they sought a stay Crocker would have been able to raise in opposition the provisions of the California Commercial Code that, in the Northern District action, led Judge Renfrew to deny interim relief.

\*\*In this connection, it should be emphasized that, given the circumstances in which Crocker finally honored Turkish Bank's repeated demand for payment, its action is unlikely to have prejudiced petitioners. Had Crocker not made payment and had Turkish Bank seized Crocker's assets, Crocker could have chosen to treat any such seizure as the practical equivalent, and the equivalent in law, of payment on the demand, and, therefore, sought reimbursement from petitioners. Thus, the positions of all parties would have been, as a practical matter, equivalent to their positions now. In addition, of course, petitioners' claims against all parties—including Turkish Bank—are unaffected by Crocker's action.

the unique and highly complex dispute among the parties that generated this petition will, as to the issues the petition seeks to have resolved, recur. Accordingly, no action by this Court on the petition possibly could affect the substantive rights of any party, and Crocker therefore suggests that there is lacking a case or controversy between the parties requisite to this Court's jurisdiction. *E.g., Fortson v. Toombs*, 379 U.S. 621 (1965); *Brownlow v. Schwartz*, 261 U.S. 216 (1923).

#### **II. The Petition Did Not, in Any Event, Warrant Exercise of This Court's Certiorari Power.**

Even if the issues were not moot, the reasons presented in the petition plainly fail to demonstrate that the Court of Appeal's decision should be reviewed by this Court. Petitioners' argument essentially is that, under this Court's decisions in *Earle v. Commonwealth of Pennsylvania*, 178 U.S. 449 (1900) and *Capital National Bank of Lincoln v. First National Bank of Cadiz*, 172 U.S. 425 (1899), 12 U.S.C. § 91 forbids state courts from issuing interlocutory orders of attachment, injunction or execution only when such orders relate to the national bank's own assets. Since, in petitioners' view, the letter of credit involved in this case was a liability of the bank, rather than an asset, section 91 did not apply.

The decision of the Court of Appeal, however, in no way conflicted with the basic interpretation of section 91 in *Earle* and *Capital National Bank*. To the contrary, the Court concluded that, because Crocker had the primary obligation to satisfy any demand under the letter of credit from its own assets and because failure to do so could result in loss to Crocker of assets held by the letter of credit beneficiary, the preliminary injunction necessarily

related to Crocker's assets and hence, under the *Earle-Capital National Bank* standard, was forbidden by section 91. In short, petitioners do not contend that the Court of Appeal applied an erroneous legal standard. Instead, they contend that the Court applied the correct legal standard erroneously to the particular facts before it.

This Court repeatedly has emphasized that its certiorari power is not exercised merely to correct this sort of error, at least absent a demonstration that the particular problem is both recurrent and important, or that the decision conflicts with decisions of other courts. No such demonstration is possible here. Indeed, in the entire history of section 91, no other court apparently has addressed its proper application to the kind of banking transaction involved in this case. The problem with which the Court of Appeal dealt is thus neither recurrent, productive of conflict, nor important in the sense justifying exercise of the certiorari power—*i.e.*, important to the public, rather than merely to the particular parties involved. *E.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This Court's decision in *Third National Bank in Nashville v. Impac Limited, Inc.*, 45 U.S.L.W. 4738 (June 17, 1977), reached subsequent to the Court of Appeal's decision in this case, does, of course, constrict the traditional section 91 standard on which, in part, the Court of Appeal relied. The Court of Appeal decision, however, is addressed to a highly unusual section 91 problem. It does not conflict in any way with *Impac's* holding nor does it suggest a need to reconsider the general problem of interpretation of section 91 that this Court so recently has addressed.

We recognize, nonetheless, that in ordinary circumstances an intervening decision by this Court might justify a remand to allow the lower court to determine whether, under

the standards this Court's decision has announced, it continues to believe that its interpretation is correct. In this case, however, a remand would have been unwarranted. *Impac* identified two polar, paradigm situations to which the language of section 91 arguably could apply, considering each in light of the congressional purpose: "to prevent state judicial action, prior to final judgment, which would have the effect of seizing the bank's property." 45 U.S.L.W. at 4741. On the one side was the situation of prejudgment seizure of bank property by its creditors, to which both the language and purpose of the statute clearly applied. On the other side was the situation presented in *Impac* itself—an action by a debtor seeking a preliminary injunction to protect its own property from wrongful foreclosure. The Court concluded that, in the latter situation, the purpose of the statute was not implicated at all and, accordingly, that section 91 did not preclude a state court from enjoining the national bank's allegedly wrongful act.

The situation in this case bears no resemblance to the wrongful foreclosure situation presented in *Impac*. To the contrary, it is identical, in practical consequences, to the kinds of prejudgment seizure by creditors to which, as *Impac* recognized, section 91 clearly applies. The interests that section 91 was intended to serve—"to minimize the risk of insolvency for national banks, and to protect bank creditors from disparate treatment"—clearly could be injured by an injunction against payment under a letter of credit, especially where, as here, failure to make payment could result in seizure and possible loss of the bank's assets and where these consequences could be avoided, if at all, only at substantial expense to the bank. Moreover, unlike the wrongful foreclosure situation in *Impac*, these consequences would follow even though the bank is alleged to have committed no legal wrong at all, and the action

against the bank is no more than a maneuver designed to increase plaintiff's likelihood of ultimate success in a dispute with third parties.

These consequences, and their adverse effects on interests that section 91 was intended to protect, were recognized and articulated in the Court of Appeal's decision. Since the result of that decision is fully consistent with *Impac's* holding, and since its reasoning comports with the purposes of the statute that *Impac* identified, a remand simply would have added unnecessarily to the delay and expense that this litigation already has caused.

### **CONCLUSION**

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT D. RAVEN,  
RONALD F. BROT and  
RONALD G. CARR

*Counsel for Respondent  
Crocker National Bank*

Dated: November 10, 1977

**(Appendix Follows)**

### **Appendix**

#### California Commercial Code § 5109:

- (1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility
  - (a) For performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or
  - (b) For any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or
  - (c) Based on knowledge or lack of knowledge of any usage of any particular trade.

- (2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

#### California Commercial Code § 5114:

- (1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified documents must be satisfactory to it.

- (2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a docu-

**Appendix**

ment of title (Section 7507) or of a security (Section 8306) or is forged or fraudulent or there is fraud in the transaction

(a) The issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (Section 3302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7501) or a bona fide purchaser of a security (Section 8302); and

(b) In all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents.

(3) Unless otherwise agreed an issuer which has duly honored a draft or demand for payment is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.